SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 86

CHARLES TERAN, FRANK GARBER and BENNY NOTO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District

The petitioners respectfully pray that a writ of certiorari issue to review the judgment rendered in this proceeding on July 25, 1969, by the Court of Appeal of the State of California, First Appellate District, Division One.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, appears in 275 Advance California Appellate Reports 127 and is reproduced in as Appendix I hereto. No other opinions were rendered in the proceedings below.

JURISDICTION

The opinion and judgment of the Court of Appeal were entered on July 25, 1969, affirming petitioners' convictions of January 18, 1968, in the Superior Court of the State of California for the County of Santa Clara. The Court of Appeal denied a timely petition for rehearing on August 13, 1969. Thereafter, on October 15, 1969, the Supreme Court of California denied a petition for hearing. On January 19, 1970, Mr. Justice Douglas signed an order extending the time for filing this petition for certiorari to and including February 12, 1970. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the monitoring, recording and transcribing (by telephone company agents) of telephone calls made by petitioners, the products of which were tendered to law enforcement as the basis for gambling, bookmaking, etc. prosecutions, constituted a violation of Section 47 USCA 605.

2. Whether the entry by peace officers (consequent to the foregoing) into the apartment of petitioner Teran without a search warrant with the seizure of items vital to his prosecution was an unreasonable search and seizure in violation of the Fourth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

1. Raising the Federal Questions

Petitioners were convicted in the Superior Court of the State of California for the commission of the crimes of bookmaking (California Penal Code §337a[2]), conspiracy to obtain telephone service by fraud (California Penal Code §502.7[a, b]), conspiracy to commit the offense of unlawful use of telephone lines and equipment (California Penal Code §591) and conspiracy illegally to wiretap (California Penal Code §640).

The gist of such charges was that the then defendants obtained possession of a contrivance known in telephone company parlance as a "Blue Box", by means of which they were enabled to place calls to various parts of the United States without payment because the instrument (as shall be described, infra) simulated "dial pulses", the tonal signals which one making a long distance call hears in the course of the call's completion. Investigating inexplicable message unit notations, etc., telephone company agents monitored petitioners' telephone calls and found that they concerned gambling and bookmaking activities. The recorded transcriptions of such calls were made available to law enforcement; concededly, no prosecution of petitioners could have been had without such materials.

In their trial as well as on appeal, petitioners specifically preserved the following Federal questions:

> A. That evidence taken in violation of Section 47 USCA 605, known as the Federal Communications Code, was inadmissible and that a conviction based thereon was thus unsupportable.
>
> B. That the procurement of evidence by a contrived raid upon the apartment of petitioner Teran (in which items, necessarily vital to the prosecution's success, were seized) was without a search warrant, was not otherwise an exception to the ordinary rules of reasonable and probable cause and was hence, in fact, an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States.

2. Factual Background

As will be seen, the "Blue Box", by means of which the petitioners avoided telephone company charges in the course of gambling operations, is not unknown as a subject for discussion in the courts of last resort of the United States. The technical name of the "Blue Box" is "multi-frequency signal generator"; its general purpose is to actuate telephone company equipment. While the appearance of this object (which can be legally purchased through a response to magazine advertisements) is ordinary, a black plastic box approximately 7″ x 4″ x 2″ containing push type buttons, its possessor, by merely using the returnable dime which will summon a long distance operator, is enabled to deceive the complicated network of telephone company impulses by "breaking" a toll circuit to call anywhere in the United States without yielding either money or subscriber information. The device was also generally described as resembling a miniature telephone operator's keyboard.

Commencing in April, 1966, telephone company tracings, so-called "print-outs" from computerized information used for billing purposes, revealed, in the area of Santa Clara County, California, a number of mysterious calls not connected with any telephone subscriber and not paid for by coins. As a result of this phenomenon, a telephone company investigation, of a complicated and technical nature, led observers to telephone lines listed to the petitioners Garber and Noto, respectively, and ultimately to another line with which a connection to Teran was established. It was

conceded at the trial that the recorded material was truly illustrative of bookmaking activities.[1]

After the incriminating information was placed in the hands of law enforcement authorities, a conference was had among Santa Clara County law enforcement officers, United States Treasury agents, and possibly members of the FBI. Surveillances followed; ultimate raids upon the respective addresses listed in the transcript yielded the then-defendants themselves, the "Blue Box" and at least moderate amounts of the material commonly characterized as bookmaking paraphernalia. The first of such conferences (preceding the raids) *took place on November 30, 1966, and the raid and arrest without a search warrant at Teran's apartment was on the morning of December 12, 1966.*[2]

3. Facts as to the Violation of 47 USCA 605

As indicated, the entire basis for the prosecution was the monitoring of telephone lines connected with the three petitioners and the transmission of information thus obtained to law enforcement authorities. This contention was admitted.

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[1]The tapes were played for the Court and it was stipulated that the court reporter would not be required to transcribe their contents. See Reporter's Transcript 152, People's Exhibits 7-A through 7-E.

[2]See cross-examination of Lt. Oria Henry Curtis, Reporter's Transcript 22 et seq.. testimony of George Alex, Reporter's Transcript 166 et seq.

4. Facts as to the Unlawful Search and Seizure of the Apartment of Teran

Even forgetting the material procured by monitoring, recording, etc., no conviction of Teran could have been obtained without introduction of the items of evidence (including a "Blue Box") seized at his apartment. Interestingly, while search warrants were regularly obtained for raids upon the respective living quarters of Garber and Noto, *who were unknown to law enforcement,* no search warrant was requested in the instance of Teran even though it was revealed to the participating officers at their first conference of November 30, 1966, *that Teran, a twice convicted bookmaker, was presumably involved in the matter.* There was no claim of emergency or that the Teran raid was other than *contrived,* because his activities were under surveillance from November 30, 1966, up to the time of the raid on the morning of December 12, 1966. According to the testimony, it was always the plan that the investigation was to culminate in a raid of Teran's apartment. Close surveillance over Teran's premises was had by deputies from sunset on the evening of December 11, 1966, until sometime after 9 A.M. the following day when the actual raid started.[3]

It was known that Garber habitually visited Teran's apartment. As said, Teran was a known bookmaker and was thought to be the leader of the suspected cabal, while Garber and Noto were completely un-

[3]Testimony, Horace C. Boydston, Reporter's Transcript 36 et seq.

known to law enforcement from the perspective of the gambling statutes.[4]

Teran's comings and goings at his apartment had been continuously observed and, on the morning of December 11, 1966, there was another meeting of law enforcement personnel attended, as before, by Lt. Oria Henry Curtis, Boydston, the District Attorney's investigator, the San Jose police, telephone security officials and at least one other member of the District Attorney's office. This conference was to finalize the three projected raids scheduled for the following day; *Lt. Curtis was informed that an entry of Teran's premises was to take place somewhat simultaneously with the other two entries mentioned.*

The person in charge of the proceeding was Assistant District Attorney Leo F. Himmelsbach. Mr. Himmelsbach directed Boydston to prepare affidavits for the procurement of search warrants upon the premises of Garber and Noto. Teran's name and his general situation were many times mentioned in the same colloquy. (From the foregoing, the only reasonable inference is that the specific plan was to proceed against Teran without a search warrant and to use the declaration "that a felony was being committed in the officers' presence" to justify the strategy.) Based upon Boydston's affidavits, the respective search warrants for the homes of Garber and Noto were issued by a municipal judge of the county some-

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[4]Id.; cross-examination of Lt. Oria Henry Curtis, Reporter's Transcript 22 et seq., testimony of George Alex, Reporter's Transcript 166 et seq.

time on December 11, 1966. At least two sheriff's men carried their vigil at Teran's premises through the night. In the morning, the members of the posse were told to await an announcement over police communications that the infamous "Blue Box" was actually being used in Teran's apartment. When such announcement was made, the raid was triggered: Teran's door was knocked down. Lt. Curtis and a group entered from the front; at the same time, by prearrangement, investigator Morris and others entered from the rear.[5]

Since it had been part of the plan that no search warrant would be obtained for Teran, it was decided, in advance, that the propriety of the raid upon his apartment would be based upon the assertion that a felony was being committed in the presence of the officers. A telephone company expert monitored Teran's line, according to prearrangement, and then informed the posse, over police radio, that the line, at that moment, was being illegally used. Unlike every other asserted illegal usage of the telephone depicted by the evidence, *this alleged call was not recorded.* In all other instances of alleged usage of the contraband "Blue Box", the tracing began with telephone company "print-outs"; *but there were not any "print-outs" produced for the alleged Teran transaction for the morning of December 12.*

> (The telephone company's witness Alex explained this apparent defect by saying, in substance, that "either the 'Blue Box' was malfunc-

[5]Testimony of Lt. Oria Henry Curtis, cited supra.

tioning or he, Alex, had made an erroneous guess on the usage of the equipment".)[6]

Without any basis beyond his own opinion as to the usage of the "Blue Box", Alex then relayed, over police radio, to Lt. Curtis, the assertion that the "Blue Box" was actually being used. Curtis said that, in his opinion, *such information constituted the commission of a felony in his presence.*[7]

Actually, the evidence concerning the basis of the telephone company representative's communication to the law enforcement personnel regarding "Blue Box" usage was ephemeral to the point of insufficiency. As noted, every other unlawful exercise of the telephone company's facilities had been documented by "printouts", etc. It was not until after the objection was made that there was *absolutely no proof* of "Blue Box" usage by Teran at 10 A.M. of December 12, 1966, that the prosecution produced testimony concerning this purported event by George Alex.

[This testimony appears in the Reporter's Transcript, pages 167 et seq. Alex's testimony before the Grand Jury did not include any explanation of the December 12th event.]

Specifics of the testimony of Alex are revealing; he said:

". . . Q. Did you record any call on that day?
A. No.

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[6]Testimony of George Alex, Reporter's Transcript 197 et seq., 205 et seq. . . . Telephone company attorneys assisted the prosecution at the trial and appeared amicus curiae in the appeal.

[7]Reporter's Transcript 1214.

Q. Was this because your equipment hadn't —you hadn't had a chance to adjust the equipment?

A. That's correct."

(Reporter's Transcript 187.)

". . . Q. Was a print-out made which would reflect the existence of that call?

A. There was a print-out made but the call wasn't on there."

(Reporter's Transcript 188.)

". . . Q. And you're giving your best guess when you say that the reason you don't have a print-out is that his device must have been, as you put it, malfunctioning?

A. That's correct.

Q. But it's only a guess; you don't know that the device was malfunctioning, do you?

A. Not positively.

Q. No; you haven't tested the device, have you?

A. No.

Q. Although a year has passed since this event took place?

A. That is right.

Q. Now, you also told His Honor that you made a guess in the usage of the equipment at your disposal which turned out to be erroneous so that you were unable to obtain any recording?

A. That is correct."

(Reporter's Transcript 196-197.)

"Q. Your equipment was not malfunctioning, was it?

A. Not then, no."

(Reporter's Transcript 198.)

"Q. No call was completed, was it?
A. No call was completed."
(Reporter's Transcript 198.)

Thereupon, Lt. Curtis proceeded to the door of the apartment and, after holding his police identification card aloft before a window behind which he thought he had seen Teran, he waited about 25 seconds and kicked the door in.[8]

The raid of Teran's apartment yielded the only evidence which could be said to provide a prima facie case against him.

REASONS FOR GRANTING THE WRIT

1. **DIAMETRICALLY CONFLICTING OPINIONS UPON THE SAME SUBJECT EMANATE FROM TWO CIRCUITS OF THE UNITED STATES COURT OF APPEALS. THE DECISION BELOW SELECTED A FIFTH CIRCUIT OPINION AS CONTROLLING AUTHORITY AND IGNORED A NINTH CIRCUIT OPINION BASED UPON FACTUAL CONTENT ALMOST IDENTICAL TO THE CASE AT BAR. BECAUSE OF CONTRARIETY OF DECISION LAW BETWEEN THE CIRCUITS, THIS COURT SHOULD GRANT THE WRIT.**

(The Ninth Circuit decision, thus unfollowed, was *Bubis v. United States* (1967) 384 Fed.2d 643; a Fifth Circuit decision, *Hanna v. United States* (1968) 404 Fed.2d 405, declined to embrace the arguments of the *Bubis* opinion and forms the central core of the decision below.)

As said, the facts in *Bubis* form a counterpart of those discussed in this petition so far as they involve violation of 47 USCA 605. *Bubis,* distinguished into

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[8]Reporter's Transcript 1619.

insignificance by the decision below, nevertheless presents, in its final paragraph, a complete answer to any attempted judicial limitation of its scope:

> ". . . While we realize that the result which we have reached means that the appellant will go unwhipped of justice, nevertheless, we reach the result on the ground that the fact is less important than that the telephone company should not resort to unreasonable and unnecessary practices which we deem contrary to the provisions of Section 605. . . ."[9]

Similarly, in the decision below, there is presented only a partial analysis of the meaning of *Bubis*, for Circuit Judge Jertberg's final footnote comment is both omitted and ignored:

> ". . . We do not mean to suggest that the *disclosure* which occurred would have been lawful if the interception had been properly limited. . . ."

The language last quoted touches the very heart of the distinction which the California Court of Appeal sought to make in its holding that the instant case should not be controlled by *Bubis*. The opinion's writer epitomizes *Bubis* as merely holding that "records were inadmissible because the interception lasted three months and exceeded what was reasonable and necessary". If the words of the judges who wrote the *Bubis* decision are to be accorded any value, one sees at once that this was not the meaning of the case at all.

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[9]The brief *Bubis* decision is set forth in full as Appendix 2.

For reasons of policy not clearly explained, the decision below adopts contrary law out of jurisdictions far removed from the California aegis. These are:

Hanna v. United States, supra;

Brandon v. United States (10th Cir. 1967) 382 Fed.2d 607.[10]

The different rationale reached in the Fifth and Tenth Circuits is patently the obvious argument that one should not be able to take advantage of his own wrongful conduct. Yet, this thought has been many times defeated by superior analogy. In *United States v. Coplan* (1950) 185 Fed.2d 629, the defendant (whose conviction had been obtained by wiretapping) was not only allowed to take advantage of her own illegal conduct but was set free after passing State secrets to a Soviet agent.

This Court clearly saw a Fourth Amendment violation in the type of matter here reviewed in Mr. Justice Stewart's well-reasoned opinion in *Katz v. United States* (1967) 389 U.S. 347, 19 L.Ed.2d 576.

The same trend is also exemplified by *Berger v. New York* (1967) 388 U.S. 41, 18 L.Ed.2d 1040.

Bubis is so completely in point, both factually and legally, that one need not argue its applicability.

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[10]The Ninth Circuit loves not the telephone company less but the constitution more.

2. THE DECISION BELOW RAISES AN IMPORTANT FOURTH AMENDMENT CONSTITUTIONAL QUESTION AS TO THE PROPRIETY OF OBTAINING EVIDENCE BY FORCIBLE ENTRY AND WITHOUT A SEARCH WARRANT WHERE THE PRECISE RAID WAS PLANNED BY PEACE OFFICERS FULLY AWARE FOR MANY DAYS OF THE IDENTITY, BACKGROUND AND ADDRESS OF THE POTENTIAL DEFENDANTS.

(If this Court's decision in *Chimel v. California* (June 1969) ..... U.S. ....., 23 L.Ed.2d 685, had not been accorded only prospective applicability, the Teran raid would fall at once by the force of this judicial writing alone. Nevertheless it becomes a clear Fourth Amendment violation by a more extended reasoning.)

B. E. Witkin, one of our best modern writers on search-seizure, says that:

> "... Unless a search is incident to a lawful arrest or by consent or under some other recognized exception, it must be made pursuant to a search warrant. The theory of the requirement is that the informed and deliberate determination of a neutral magistrate, rather than the hurried actions of police, engaged in ferreting out crime, should determine the vital issue of probable cause for a search. (See *Aguilar v. Texas,* (1964) 378 U.S. 108, 12 L.Ed.2d 723.)"
>
> Witkin, *California Evidence,* Article on "Exclusion of Illegally Obtained Evidence", page 123.

See also the opinion of California's retiring Chief Justice Roger J. Traynor in *People v. Shelton* (1964) 60 C.2d 740.

One may cull the following literal questions and answers from the record at bar:

Q. Why did Lt. Curtis possess moral certitude that a felony was actually being committed on the morning of December 12th?

A. Because Mr. George Alex told him so over the police radio.

Q. But where was the evidence that any illegal telephone call by usage of a "Blue Box" was actually made?

A. Only in the opinion of Mr. Alex.

It is thus seen that the record is devoid of any corroborative evidence of "Blue Box" usage immediately preceding the raid of Teran's apartment. In view of the meticulous care devoted to the preparation of the prosecution's case, the accurate monitoring of specific telephone calls, etc., the lack of any real evidence to show the existence of the one phone call which might have served as a foundation for the raid creates an enormous and unanswerable criticism. (Witnesses explained that telephone company records of each illegal call were represented by "print-outs"; the prosecution's Exhibit 8 contains the full record of "print-outs" but our record shows no "print-out" for the suggested telephone call on the morning of December 12 on Teran's telephone. One suggests that there was no such telephone call and that the expert's usage of the word "guess" is a limitation upon the foundation for his so-called opinion.)

As the officers testified, someone announced to them that the "Blue Box" was being used and they acted

upon such advice. The advice was unsupported by fact.

Upon the point last advanced, the opinion in *People v. Pease* (1966) 242 C.A.2d 442 is pertinent and provides these principles:

> ". . . Where reasonable cause is predicated on information communicated by others, evidence must be presented justifying the conclusion that reliance on such information is reasonable. . . .
>
> ". . . The mere fact that information acquired by an arresting officer comes from a fellow officer as a hearsay statement not based on the latter's personal observation does not justify the conclusion that reliance thereon is reasonable in the absence of evidence showing that the information to the police was reliable or that such information had its source in official police files or records. . . ."

We hence urge, again, that the Teran apartment raid was a pure Fourth Amendment violation.

CONCLUSION

1. The existence of a clear conflict between *Bubis* (9th Circuit) and *Hanna* (5th Circuit) is, of itself, a firm basis for the resolution of the point by the Court.

2. The factual basis for the "contrived" raid absent a search warrant is an ingenuous (although inexplicable) route for avoiding the mandate of *Mapp v.*

Ohio (1961) 367 U.S. 643, 6 L.Ed.2d 1081, and should not be countenanced.

For the reasons set forth above, a writ of certiorari should issue to review the judgment below.

Dated, February 10, 1970.

Respectfully submitted,
CHARLES TERAN,
FRANK GARBER,
BENNY NOTO,
Petitioners,

By JAMES MARTIN MACINNIS,
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(Appendices Follow)

Appendix 1

(Vol. 275, A.C.A. 127)

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Criminal No. 7,334

The People of the State of California,
Plaintiff and Respondent,
vs.
Frank Garber et al.,
Defendants and Appellants.

OPINION

Defendants appeal from judgments of conviction following trial by the court. All three defendants were convicted of bookmaking (Pen. Code, § 337a, subd. 2); of conspiracy to obtain telephone service by fraud (Pen. Code, § 502.7, subd. (a), 502.7, subd. (b)); of conspiracy to commit the offense of unlawful use of telephone lines and equipment (Pen. Code, § 591); and of conspiracy to illegally wire tap. (Pen. Code, § 640.) For the reasons hereinafter stated, we have concluded that the judgments must be affirmed.

Facts

A multi-frequency signal generator or "blue box" is a device designed to enable the user to avoid long-distance telephone charges. The user first dials a toll-free long-distance information number. Then he activates the "blue box" to produce a 2600 cycle tone which terminates the connection with the information operator although the user still has access to the open trunk line. As long as the line is held open the user can utilize impulses from the "blue box" to place any number of long-distance telephone calls without the telephone company having any record of areas called or charges incurred. The telephone company records simply indicate that a free call has been made from a given telephone number. On occasion, in order to determine if there is trouble on the lines, the telephone company "prints out" the unbilled computerized data pertaining to toll-free information calls. From April through November 1966 such "prints outs" indicated that 2,020 long-distance information operator calls were made from number 361-1261. Defendant Garber was the subscriber to this telephone number. A number of the calls were unusually lengthy. The "print outs" also showed that from August to November 1966 approximately 40 such long-distance operator calls were made from another number (377-4275) listed to defendant Garber. Other computer "print outs" indicated 345 information calls made in a two-month period from one telephone number listed to defendant Noto and 14 such calls from another number of his. Some of these calls were of an unusual length. Still

other "print out" information obtained by the company showed numerous long-distance calls from numbers listed to defendant Garber under a false name and installed in apartments actually rented to defendant Teran. The telephone company next checked the telephone lines and discovered no trouble in the lines.

The telephone company began monitoring one of Garber's numbers (371-1261) on October 24, 1966, using a device designed to monitor only those outgoing calls commencing with the 2600 cycle tone generated by the "blue box." After about 28 hours of actual monitoring, this procedure was discontinued on November 2, 1966. During the time the company was monitoring, only 65 minutes in "blue box" calls were actually overheard and recorded by the company. Apparently none of the other aforementioned numbers were monitored.

On November 29, 1966, the telephone company met with law enforcement officials and informed them that they had the "print out" information indicating the used of "blue boxes" at the residences of all three defendants. The telephone company representatives also informed the officials that they had monitored the one telephone at defendant Garber's residence. At this time company representatives did not divulge the contents or subject matter of the recordings made during the monitoring procedure. The district attorney made a written demand for the recordings and they were subsequently produced on November 30, 1966. The recordings were introduced in evidence at the grand jury hearing as well as at the trial and it was stipu-

lated at the trial that these recordings clearly indicated bookmaking activities. The admission of this evidence was over the objection of all defendants.

On December 11, 1966, a warrant was procured for the search of the premises at 2395 New Jersey Avenue, San Jose, the residence address of defendant Garber. On the morning of December 12, 1966, San Jose police officers went to the address to execute the warrant. Although they had information that defendant Garber was not at home, the officers went to the door and rang the bell. After receiving no response they rang the bell a second time. They then heard some unintelligible noises in the house, the sort of noises which indicated movement within the house. One of the officers then kicked open the door so that an entry could be made. Mrs. Garber and a minor child were in the house. They had apparently been bathing. Approximately 40 seconds elapsed between the forced entry and the first ringing of the doorbell. In the search that followed, the officers found one piece of lined paper with first names, initials and telephone numbers, one piece of lined paper with defendant Noto's name and a series of telephone numbers; a long-distance telephone bill with defendant Noto's name, a newspaper clipping concerning wiretapping and some printed sheets on "Bowl Games." The officers also saw a box similar to a "blue box" but did not seize it. The items taken were admitted into evidence before the grand jury and at trial defense counsel objected to their admission on the ground that the officers had not properly identified themselves pursuant to the provisions of Penal Code section 1531.

On December 11, 1966, a warrant for the search of the Santa Clara premises of defendant Noto was also obtained. The warrant was executed on the morning of December 12, 1966, at which time defendant Noto admitted the officers. During the search a number of dated publications entitled "The National Daily Reporter" were found. Accounting sheets and other bookmaking paraphernalia were also uncovered. A "blue box" was also discovered and seized. These items were all introduced into evidence at the grand jury hearing.

No warrant was obtained for the search of the apartment of defendant Teran. Police began surveillance of this apartment on the evening of December 11, 1966. The next morning the telephone company put its monitoring device on the telephone line to this apartment. A little after 10 a.m., by use of this monitoring equipment, a telephone company representative heard the 2600 cycle tone emitted by a "blue box." Law enforcement officials were informed but no record of calls was made because the equipment was not properly adjusted. By prearrangement police officers were advised that the device was being used and they then went to the apartment. The officers knocked on the door and defendant Teran appeared at a window and asked who was there. One of the officers held his sheriff's identification card to the window for Teran to read. Teran then disappeared and when there was no further response, the officers forced entry. Defendants Garber and Teran were both found in the apartment. An adding machine and almost $3,000 in currency was discovered. Two of the "blue box" devices were also recovered, along with a number of racing

journals and betting records. Both Teran and Garber were placed under arrest. At trial, counsel for defendant Teran objected to the admission of this evidence.

A Federal Bureau of Investigation specialist in bookmaking investigation testified before the grand jury to the effect that the material recovered during the searches was used for bookmaking activity.

Contentions

All defendants contend that the convictions must be reversed because they are based on evidence obtained in violation of 47 U.S.C.A. section 605 prohibiting the unauthorized publication or use of certain communications by wire or radio, and that the monitoring procedure violated the right of privacy gauranteed by the Fourth Amendment. Defendants Garber and Noto also contend that the evidence obtained at Garber's residence was inadmissible because the officers who executed the search warrant failed to comply with the provisions of Penal Code section 1531. Defendant Teran also argues that the evidence obtained at his apartment is inadmissible because the officers did not have a search warrant. At oral argument Teran also contended that the forcible entry of Teran's residence was in violation of Penal Code section 844.

The Fourth Amendment

In *Katz v. United States* (1967) 389 U.S. 347, 353, 354-359 [19 L.Ed.2d 576, 583, 584-586, 88 S.Ct. 507], it was held that electronic eavesdropping by law enforcement authorities upon private conversations is a search

and seizure within the meaning of the Fourth Amendment and that such eavesdropping meets constitutional standards only when authorized by a neutral magistrate upon a showing of probable cause under precise limitations and appropriate safeguards. (See also *Desist v. United States* (1969) ..... U.S. ....., ... [22 L.Ed.2d 248, 253, 89 S.Ct. .....].) This rule applies, however, only to cases in which the prosecution seeks to introduce the fruits of an electronic surveillance conducted after December 18, 1967, the date of the *Katz* decision. (*Desist v. United States, supra.*)

We note, moreover, that although evidence obtained in violation of the Fourth Amendment is inadmissible in state courts, the amendment does not apply to searches by a private individual unless such individual is wilfully participating in a joint activity with a state agent who either requests the illegal search or has knowledge of it but fails to protect the third party's rights. (*Stapleton v. Superior Court,* [a]70 Cal. 2d....., ...-....., ... [73 Cal.Rptr. 575, 447 P.2d 967]; see *Burdeau v. McDowell* (1921) 256 U.S. 465 [65 L.Ed. 1048, 41 S.Ct. 574, 13 A.L.R. 1159); *People v. Cahan,* 44 Cal.2d 434, 445 [282 P.2d 905, 50 A.L.R.2d 513].) In the instant case the electronic eavesdropping was by the telephone company and there is no evidence of any government participation. In any event, the electronic surveillance took place in 1966 and therefore is not subject to the ruling of the *Katz* decision.[1]

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[a]Advance Report Citation: 70 A.C. 101, 103-104, 105.

[1]The instant case was tried on October 30, 1967.

Applicability of 47 U.S.C.A. Section 605

Defendants contend that the tape-recorded conversations resulting from monitoring of defendant Garber's telephone should have been excluded from evidence because they were obtained in violation of 47 U.S.C.A. section 605, which prohibits the unauthorized publication or use of certain communications.[2] This contention is without merit because at the time of the alleged violation the federal provision had no application to the admission of evidence in state courts.

In *Schwartz v. Texas* (1952) 344 U.S. 199, 201 [97 L.Ed 231, 234, 73 S.Ct. 232], it was held that communications intercepted in violation of 47 U.S.C.A. section 605 were admissible in a state court. (See *People v. Channell* (1951) 107 Cal.App.2d 192, 198-199 [236 P.2d 654].) The *Schwartz* case was overruled in *Lee v. Florida* (1968) 392 U.S. 378 [20 L.Ed2d 1166, 88 S.Ct. 2096], which held such evidence to be inadmissible in state court trials. The basis of the holding in *Lee* was that *Mapp v. Ohio* (1961) 367 U.S. 643 [6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 A.L.R.2d 933] had overruled *Wolf v. Colorado* (1949) 338 U.S. 25

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[2]Section 605 of the Federal Communications Act provides, in pertinent part, "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, . . . or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."

[93 L.Ed. 1782, 69 S.Ct. 1359) upon which *Schwartz* had relied for the holding that state courts "were free to decide for themselves whether to condone violations of federal law by accepting the products of such violations as evidence." (P. 385 [20 L.Ed.2d p. 1172].) However, in *Fuller v. Alaska* (1968) 393 U.S. 80 [21 L.Ed.2d 212, 89 S.Ct. 61], the court held that *Lee* was to be applied only to trials in which such evidence is sought to be introduced after June 17, 1968, the date of the *Lee* decision. In the present case the evidence in question was introduced prior to the decision in *Lee.*

We are satisfied, moreover, that under the facts of this case there was no violation of the statute on several grounds. We are particularly impressed by the holding in *United States v. Sugden,* 226 F.2d 281, 285 (affirmed per curiam, 351 U.S. 916 [100 L.Ed. 1449, 76 S.Ct. 709]), that where the use of a communication facility is illegal the right of privacy does not exist and the intercepted matter may be divulged. (See also *Hanna v. United States,* 404 F.2d 405, 407-408; *Brandon v. United States,* 382 F.2d 607, 611.) In *Hanna,* a case involving the subject statute, tape recordings divulged by a telephone company and gambling paraphernalia found as a result of such recordings were properly admissible against a defendant who had made illegal use of communication facilities and whose communications had been intercepted by the telephone company.

We also agree with the analysis of *Hanna* that because the law requires telephone companies to discover

illegal telephone calls (47 U.S.C.A., §§ 202, 203, 220) investigative work carried out to discover such calls has become a part of the transmission of communications. It was there held that " 'a security officer, in the light of present day developments, should be included among company employees engaged in the transmission of communications.' " (404 F.2d at p. 408; see also *Brandon v. United States, supra,* 382 F.2d 607.) Accordingly, since the first part of 47 U.S.C.A. section 605 provides that persons "receiving or assisting in receiving, or transmitting, or assisting in transmitting" communications can publish or divulge such communications "in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority," the divulging of such communications in response to a proper demand was not in violation of 47 U.S.C.A. section 605. In the instant case the monitoring of defendant Garber's telephone was carried out by a security agent for the telephone company and the communications properly intercepted by him were divulged upon written demand of the district attorney.

In *Bubis v. United States,* 384 F.2d 643, a case involving a "blue box," although the court was of the opinion that a security officer was not an employee engaged in the transmission of communications (p. 646), the following principle was clearly stated: "When a subscriber of a telephone system uses the system's facilities in a manner which reasonably justifies the telephone company's belief that he is violating his subscription rights, then he must be deemed to have consented to the company's monitoring of his

calls to an extent reasonably necessary for the company's investigation. [Citation.]" (P. 648.) It was there held that the recording were inadmissible because the interception lasted three months and exceeded what was reasonable and necessary.[3]

The Arrest of Teran

Defendant Teran contends that the officers did not have reasonable cause to arrest him and that the evidence obtained in the search of his residence should have been excluded because the officers did not obtain a search warrant, although the search had been planned for some time.

Turning first to defendant's contention that there was no reasonable cause for the arrest, he notes that the officer in charge was informed by the telephone company security officer that the "blue box" at the Teran residence was in use on the morning of December 12, 1966, prior to the time the officers went to the premises. Defendant claims that the "reasonable cause" to arrest was contrived and particularly emphasizes the fact that no recording of the communication in question was made. We find no merit in defendant's argument and conclude that the information received from the telephone company security officer concerning the violation of the wiretapping law provided sufficient probable cause to support an arrest. As we stated in *People v. Gardner,* 252 Cal.App.2d 320 [60 Cal.Rptr. 321]: "[A] citizen who purports to be the victim of

[3]The *Bubis* court strongly suggested in a footnote (fn. 5, p. 648) that although the interception was lawful, it did not mean to suggest that the disclosure was lawful.

or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proven or tested. [Citations.] The rationale underlying this principle is that such a person is 'more than a mere informer. He is an observer of criminal activity, who by calling the police, acts openly in aid of law enforcement.' [Citations.]" (Pp. 324-325.) Here the telephone company officer knew of criminal activity when he heard the signal which indicated a "blue box" was being used. He assisted the officers by passing along this information and under all the circumstances of this case can most assuredly be considered a reliable informer.

Since there was reasonable cause for Teran's arrest, a reasonable search incidental to his arrest was proper and not violative of the Fourth Amendment. (*United States v. Rabinowitz,* 339 U.S. 56, 60 [94 L.Ed. 653, 657, 70 S.Ct. 430]; see *People v. Brooks,* 234 Cal.App. 2d 662, 667 [44 Cal.Rptr. 661].) This is true even though the officers may have previously had sufficient information to justify the issuance of a search warrant. As pointed out in *Rabinowitz, supra,* "The reievant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." (P. 66 [94 L.Ed p. 660].)

At oral argument we noted that in *Chimel v. California* (1969) ..... U.S. ..... [23 L.Ed.2d 685, 89 S.Ct. .....], decided on June 23, 1969, a new rule was announced by the United States Supreme Court overruling the *Rabinowitz* case insofar as it held that a warrantless search incident to a lawful arrest extends

generally to the area that is considered to be in the possession or control of the person arrested. In *Chimel* it was held that such a search is limited to a search of the arrestee's person and the area within his immediate control, that is, "the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." (23 L.Ed.2d at p. 697.) Counsel for defendant Teran argued that the items obtained in the search were located within the area specified by *Chimel.* In *People v. Castillo,* [b]274 Cal.App.2d ....., ... [..... Cal.Rptr. .....], it was held that in *Chimel* the Supreme Court intended that the new rule should be given prospective application to searches conducted after the date of its decision. The *Catsillo* court reasoned that the rationale upon which *Desist v. United States, supra,* 22 L.Ed.2d 248, held *Katz v. United States, supra,* 389 U.S. 347 (holding electronic eavesdropping to be a search and seizure within the meaning of the Fourth Amendment) should apply prospectively was equally applicable to the *Chimel* case. We agree with *Castillo.* Therefore, we need not determine whether the scope of the search exceeded the new rules of *Chimel.* Since the instant search was within the area approved by *Rabinowitz,* we hold that the search was reasonably incident to the arrest.

Compliance With Penal Code Sections 1531 and 844

Defendants Garber and Noto argue that the evidence uncovered during the search of Garber's resi-

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[b]Advance Report Citation: 274 A.C.A. 549, ...

dence should have been excluded because the police officers made a forcible entry in order to execute the search warrant. According to Penal Code section 1531,[4] "The officer may break open any outer or inner door of a house . . . to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." As already noted, the officers forcibly entered the residence after ringing the doorbell twice in a 40-second period and after hearing some "unintelligible sounds" within the house.

Defendant Teran argues that the forcible entry into his residence was in violation of section 844 which provides, in pertinent part, that ". . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

In proceeding to discuss these respective contentions we note, initially, that an entry of a house in violation of sections 844 or 1531 renders any following search and seizure unreasonable within the meaning of the Fourth Amendment. (*Greven v. Superior Court,* [*]71 Cal.2d ....., ... [78 Cal.Rptr. 504, ... P.2d .....]; *People v. Rosales,* 68 Cal.2d 299, 304-305 [66 Cal.Rptr. 1, 437 P.2d 489].) We also observe that these two sections have been held to be "identical in principle" insofar as their announcement requirements are con-

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[4]All statutory references hereinafter made, unless otherwise indicated, are to the Penal Code.

[*]Advance Report Citation: 71 A.C. 303, 306.

cerned. (*People v. Villanueva,* 220 Cal.App.2d 443, 447 [33 Cal.Rptr. 811]; *Greven v. Superior Court, supra,* at p. [d]....., fn. 6; *People v. De Santiago,* [e]71 Cal.2d ....., ..., ... [76 Cal.Rptr. 809, 453 P.2d 353]; *People v. Benjamin,* [f]71 Cal.2d ....., ... [78 Cal.Rptr. 510, ... P.2d .....].) Additionally, we note that the rule of announcement as set forth in these sections is not complied with unless the officers prior to entry give notice of their authority. (*Greven v. Superior Court, supra,* at p. [g].....; *People v. Benjamin, supra.*)

In *Greven* it was pointed out that the cases holding the requirements of section 844 satisfied by " 'substantial compliance' " involved situations where the officers actually identified themselves but failed to announce their purpose. (71 Cal.2d at pp. [h].....-.....; see *People v. Marshall,* [i]69 Cal.2d 51, 55-56 [69 Cal.Rptr. 585, 442 P.2d 665]; *People v. Cockrell,* 63 Cal.2d 659, 665-666 [47 Cal.Rptr. 788, 408 P.2d 116]; *People v. Carswell,* 51 Cal.2d 602, 607 [335 P.2d 99]; *People v. Martin,* 45 Cal.2d 755, 762-763 [290 P.2d 855].) Since section 1531, dealing with search warrants, is the counterpart of section 844, the rule of announcement recognized in *Greven* is equally applicable to the announcement requirement set forth in section 1531. Accordingly, the cases which have held that the requirements of section 1531 may be excused where specific factual cir-

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[d]Advance Report Citation: 71 A.C. 303 at p. 308, fn. 6.
[e]Advance Report Citation: 71 A.C. 18, 25, 29.
[f]Advance Report Citation: 71 A.C. 312, 315.
[g]Advance Report Citation: 71 A.C. 303 at p. 309.
[h]Advance Report Citation: 71 A.C. 303 at pp. 307-308.
[i]Advance Report Citation: 69 A.C. 46, 50-51.

cumstances give rise to a "reasonable belief on the part of the officers that unannounced entry was necessary to prevent destruction of evidence, discourage escape, or insure the officers' safety" (*People v. Hamilton,* [1]71 Cal.2d ....., ... [77 Cal.Rptr. 785, 454 P.2d 681]; see e.g., *People v. Scott,* 259 Cal.App.2d 268, 279 [66 Cal.Rptr. 257]; *People v. Cain,* 261 Cal.App.2d 383, 389 [67 Cal.Rptr. 922]), must be understood to apply only to the failure to announce the purpose for which admittance is desired. (See *People v. Benjamin, supra,* [1]71 Cal.2d ....., ...)

Here, with respect to the entry in Garber's residence, the officers did not comply with section 1531 at all. It is clear that they gave no notice of their authority at any time prior to the entry, and that, accordingly, there was no compliance with the indispensable rule of announcement of authority delineated in *Greven.* We need not, therefore, discuss whether the circumstances excused compliance with the announcement of the purpose for the entry.

Accordingly, we hold that the entry in this case was not effected in compliance with the provisions of section 1531, that the search and seizure which was undertaken subsequent to such entry was unreasonable and unlawful, and that the fruits of such search and seizure were inadmissible in evidence. Our conclusion, however, does not require a reversal because the error was harmless within the rule set out in *Chapman v. California,* 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].

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[1]Advance Report Citation: 71 A.C. 189, 191.

[1]Advance Report Citation: 71 A.C. 312, 315.

The evidence which was seized consisted of a few items of documentary evidence which was merely cumulative with the considerable amount of evidence which was properly received in evidence. We conclude, therefore, that the evidence submitted against defendants Garber and Noto conclusively established their guilt and that the introduction in evidence of the items of documentary evidence obtained at the Garber residence did not contribute to the verdicts against them. Accordingly, we are able to declare a belief that the error in admitting such evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* at pp. 23-24 [17 L.Ed2d at pp. 710-711].)

Adverting to the entry of Teran's residence, we perceive no violation of section 844. When the officers knocked at the door and Teran appeared at the window and asked who was there, the officers announced their authority when one of the officers held his sheriff's identification card to the window for Teran to read. This satisfied the minimum compliance required by section 844 as delineated in *Greven, supra.* With respect to the second requirement of section 844 that the officers explain "the purpose for which admittance is desired," due to exigent circumstances substantial compliance with the provisions of the section was achieved and literal compliance was not required. When Teran disappeared and made no further response after the officers identified themselves, these circumstances and the facts already known by the officers concerning the telephone monitoring and the use of a "blue box" at the Teran residence were such

as to give rise to a reasonable belief on the part of the officers that a demand for admittance would be futile and that an entry without an express announcement of purpose was necessary to prevent the destruction of evidence and to discourage escape.

The judgments are affirmed.

Molinari, P. J.
Sims, J., and Elkington, J., concurred.

Filed July 25, 1969,
Lawrence R. Elkington, Clerk.

Appendix 2

United States Court of Appeals
for the Ninth Circuit

Alvin Bubis, Appellant, vs. United States of America, Appellee.	No. 21,356

[October 20, 1967]

On Appeal from the United States District Court
for the Central District of California

[Formerly the United States District Court for the Southern District of California, Central Division]

Before: JERTBERG, BROWNING and ELY, Circuit Judges.

JERTBERG, Circuit Judge:

Following trial to the court, appellant was convicted of violating 18 U.S.C. § 1084 [interstate transmission of wagering information], and was sentenced to one year's imprisonment, execution of sentence suspended, fined $2,000 and placed on probation for one year.

On this appeal the facts are set forth in a stipulated statement of facts approved and certified to by the district judge pursuant to and in conformity with the

provisions of Rule 76, Federal Rules of Civil Procedure.

The agreed statement of facts is as follows:

For some time prior to November, 1966, a device had been in use in the Los Angeles area which emitted a signal which was designed to enable the user to circumvent the telephone company's automatic record-keeping equipment, thereby avoiding long distance charges. The method normally followed was to telephone by direct dialing an information operator in another city and to cause the device to emit an audible signal which gave control of the long distance trunk line to the user. The Pacific Telephone Company was investigating this situation by keeping a record of the number and duration of direct dialing telephone calls to information operators in various parts of the country. In November, 1965, it was noted that a large number of direct dialing telephone calls were made from the telephone number subscribed to by appellant to information operators in various parts of the country. It was further noted that these calls were of an unusual duration, some as long as ten minutes. As a result of the foregoing information, commencing approximately December 20, 1965, the Pacific Telephone Company connected automatic monitoring equipment to appellant's telephone line which recorded all of appellant's outgoing and incoming telephone calls, except for such periods as the recording tape may have been expended. The equipment was maintained until approximately March 24, 1966, without the knowledge or consent of appellant or any of the persons with whom he spoke on the telephone.

On April 11, 1966, an agent of the telephone company advised the United States Attorney's office of the foregoing facts and stated that certain of the recorded conversations "sounded like gambling". Subsequently, tapes of the recorded conversations were produced pursuant to a Grand Jury subpoena duces tecum. The tapes revealed that gambling information was being conveyed over interstate telephone lines by the appellant for three consecutive days commencing December 20, 1965. No other gambling activity was noted up to March 24, 1966, at which time the recording equipment was removed from appellant's telephone lines.

An indictment was filed against the appellant on June 2, 1966, charging him with a violation of 18 U.S.C. § 1084. On July 11, 1966, appellant filed a motion to suppress all of the evidence hereinbefore referred to on the ground that the same had been illegally obtained. A hearing was had on the motion and on July 21, 1966, the said motion was denied by the district court. On July 25, 1966, trial commenced before the district court sitting without a jury. During the trial appellant made timely objections to the introduction of all evidence obtained through the use of the monitoring equipment. On August 15, 1966, the Court entered judgment against appellant finding him guilty of the charges set forth in the indictment. It is conceded that all of the evidence at the trial arose from the use and admission into evidence of the contents of the taped telephone conversations for the three day period commencing December 20, 1965.

On this appeal, appellant specifies that the district court erred in denying appellant's motion to suppress evidence obtained through wire-tapping, in admitting the evidence thus obtained, and in finding the appellant guilty of the offense charged.

The parties to this appeal are in agreement that under the facts before us, the judgment appealed from must be affirmed unless the use of such evidence is prohibited by the provisions of 47 U.S.C. § 605;[1]

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[1] 47 U.S.C. § 605 provides:

"§ 605. Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

otherwise, the judgment must be reversed. Willful and knowing violation of Sec. 605 is penalized by fine and imprisonment.[2]

The problem presented requires us to analyze the pertinent provisions of Section 605. Section 605 addresses itself to two distinct classes of persons.

The first part of the section is directed to those employees of systems of communication who have to do with the sending, receiving, or forwarding of interstate or foreign communications by wire or radio, and provides that no such person shall divulge or publish the existence, contents, substance, purport, or effect of any such communication to anyone other than the addressee or his authorized representative, or to authorized fellow employees, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority.

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[2]47 U.S.C. § 501 provides:
"§ 501. General penalty
"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

Obviously, this part of the section was designed and intended to protect the integrity of communications systems and it has so been judicially declared.[3]

There is nothing in the stipulation or the record to suggest or indicate that the employee or agent of the telephone company who connected automatic monitoring equipment to appellant's telephone line which recorded all of appellant's outgoing and incoming telephone calls from December 20, 1965 to March 24, 1966, and who advised the government of the facts set forth in the stipulation and who responded to the Grand Jury subpoena, had anything to do with receiving, or assisting in receiving, or transmitting, or assisting in transmitting any interstate or foreign communication on behalf of his employer. In fact, the record discloses that the employee or agent was a special agent of the telephone company in charge "of investigation of the manufacture, use and sale in the Los Angeles area of an instrument and device known as a multi-frequency signal generator (hereinafter referred to as 'the device'), which is being manufactured, sold and used for the purpose of completion of telephone calls, especially long distance telephone calls, and which enables the Telephone Company's billing equipment to be by-passed, and therefore, to avoid payment for the service for said calls charged by the Telephone Company to its customers for using the Telephone Company's facilities." Hence, he was not, under the express language of the first part of the

[3]See *Nardone v. United States*, 302 U.S. 379 (1937); *Benanti v. United States*, 355 U.S. 96 (1957); *Rathbun v. United States*, 355 U.S. 107 (1957).

section, within the class of employees of the telephone company who were authorized to divulge or publish the existence, contents, etc., of a communication sent or received of the telephone company's system in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority.[4]

The second part of the section is directed to all persons, not of the class of persons included in the first part of the section, who are not authorized by the sender of the communication to intercept and divulge or publish such communication. In this respect the second part of the section states:

> "* * *; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *."

It is patent that the second part of the section was designed and intended not only for the purpose of protecting the integrity of communications systems, but also for the protection of privacy to those who use the facilities in a proper and normal manner.

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[4]As we have noted, the first clause of § 605 authorizes disclosure only "in response to a subpoena issued by a court of competent jurisdiction, or on demand or other lawful authority," but in this case information regarding the existence and contents of the intercepted conversations was initially volunteered to the United States Attorney by an agent of the telephone company. We do not reach the question of whether the initial voluntary disclosure was prohibited by the first clause of § 605, and, if so, whether disclosure before the grand jury and trial in response to the government subpoena was barred as the fruit of the initial voluntary disclosure. See *Nardone v. United States,* 308 U.S. 338 (1939).

It is to be noted that the second part of the section, unlike the first part of the section, does not permit the divulgence or publication of the communication in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority. This distinction between the two parts of the section was recognized in *Nardone v. United States*, 302 U.S. 379, 381 (1937), where the court stated:

> "Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena."

Under the literal language of the second part of the section, the agent or employee of the telephone company who intercepted the communications and divulged the existence, purport, and tenor thereof to the United States Attorney was forbidden to do so, since, under the stipulation, the interception was "without the knowledge or consent of appellant or any of the persons with whom he spoke on the telephone."

In the instant case, preliminary investigation by the telephone company revealed that a large number of direct dialing calls were made from the telephone number subscribed to by appellant to information operators in various parts of the country, many of which calls were of unusually long duration. As a result of the preliminary investigation, the company connected automatic monitoring equipment to appel-

lant's telephone line. This occurred on December 20, 1965. Within three days, or by December 23, it was clearly established that appellant had an attachment to his telephone instrument which enabled him to make long distance calls without a record of such calls being made by the telephone company; that he was illegally transmitting messages over long distance circuits of the telephone company; that he was defrauding the company of the charges to which the company was entitled, and depriving the government of the tax imposed on long distance calls, and was a trespasser on the communications system.

To apply the literal language of the second part of the section to the foregoing circumstances would, in our view, reach an absurd result, contrary to common sense and reasonable business practices, and would be disruptive of the integrity of communications systems. It would mean that communications systems are powerless to take reasonable measures to protect themselves and their properties against the improper and illegal use of their facilities.

We do not believe that in the enactment of Section 605, or in any of the provisions of Title 47, Congress intended to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser.

In *Rathbun v. United States*, 355 U.S. 107 (1957), at page 109, the Court stated that Section 605 "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature."

When a subscriber of a telephone system uses the system's facilities in a manner which reasonably justifies the telephone company's belief that he is violating his subscription rights, then he must be deemed to have consented to the company's monitoring of his calls to an extent reasonably necessary for the company's investigation. See *Brandon v. United States,* ..... F.2d ..... (10th Cir. 1967) [decided August 29, 1967], and cases therein cited.

The record discloses that the telephone company continued from December 23, 1965, until March 24, 1966, for a period of three months, to monitor all calls made and received by appellant, and to tape record the conversations of all such calls. In our view the monitoring and tape recording for such length of time, after ample evidence had been secured of the illegal use by appellant of the company's facilities, was unreasonable and unnecessary. To sanction such practices on the part of the telephone company would tend to emasculate the protection of privacy Section 605 was intended to protect.

In these circumstances the district court erred in admitting into evidence the tape recordings which were produced in response to the subpoena duces tecum.[5]

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[5]In holding that the tape recordings were inadmissible because *the interception* exceeded that necessary to enable the telephone company to determine whether appellant was a trespasser upon its property and, if so, to pursue its remedies against him, we do not mean to suggest that *the disclosure* which occurred would have been lawful if the interception had been properly limited. The second clause of § 605 prohibits unauthorized divulgence as well as unauthorized interception. Disclosure as well as interception is limited by the consent reasonably implied; that is, con-

While we realize that the result which we have reached means that the appellant will go unwhipped of justice, nevertheless, we reach the result on the ground that that fact is less important than that the telephone company should not resort to unreasonable and unnecessary practices which we deem contrary to the provisions of Section 605.

The judgment of conviction is reversed and the cause remanded to the district court with instructions to dismiss the indictment.

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sent to such invasion of the subscriber's privacy as is necessary to protect the telephone company's property. In the present case, disclosure of what was *said* in appellant's telephone conversations (as distinguished from the fact that the long distance calls were made and not paid for) had no relationship to protecting the telephone company's property. It is equally difficult to find any implied consent by appellant to disclosure for the purpose of convicting him of using interstate telephone facilities for gambling. Disclosure for this purpose contributed nothing either to the collection of long distance tolls that appellant may have owed the company, or to preventing him or others from thereafter using long distance telephone facilities without paying.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1176 Misc.

CHARLES TERAN, FRANK GARBER, and BENNY NOTO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, is reported in 275 A.C.A. 127 (1969). This opinion is appended as "Appendix 1" to the Petition for Writ of Certiorari.

On August 13, 1969, the Court of Appeal denied petitioners' application for a rehearing.

On October 15, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether evidence introduced in a state court proceeding antedating *Lee v. Florida*, 392 U.S. 378 (1968), was inadmissible under the Federal Communications Act, 47 U.S.C. §605, as construed in *Lee*, notwithstanding that *Fuller v. Alaska*, 393 U.S. 80 (1968), makes *Lee* and the Act inapplicable.

2. Whether the search of petitioner Teran's apartment violated the Fourth and Fourteenth Amendments.

STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

Federal Communications Act, 47 U.S.C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of

transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ."[1]

STATEMENT

Petitioners were indicted and convicted for bookmaking, for conspiring to obtain telephone service by fraud, for conspiring to wiretap illegally, and for conspiring to commit the offense of unlawful use of telephone lines and equipment. Petitioner Teran admitted two prior felonies, bookmaking and conspiracy; petitioner Garber admitted a prior conviction for forgery (CT 145-46, 193).

The judgments of conviction were affirmed by the Court of Appeal on July 25, 1969. The Court of Appeal denied a petition for a rehearing on August 13, 1969. On October 15, 1969, the California Supreme Court denied petitioners' application for a hearing

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[1]Section 605 was amended on June 19, 1968. See Pub.L. 90-351, Title III, §803, 82 Stat. 223.

without opinion. Mr. Justice Douglas granted petitioners an extension of time until February 12, 1970, within which to seek review of the judgment of the Court of Appeal of the State of California. The petition for a writ of certiorari was filed on February 12, 1970.

Petitioners converted their bookmaking establishment into a lucrative cottage industry. Operating from separate residences, together the trio handled weekly some $20,000 in betting action (CT 135). Employing at each location an illicit device commonly known as a "blue box," they greatly reduced their overhead by using free of charge the communication lines of the Pacific Telephone and Telegraph Company.

George Alex, a security agent in the accounting department of the telephone company (RT 167-68), explained the utility's standard practice of running computerized print-outs of telephone circuit activity in order to detect equipment malfunctions (CT 26-27). Print-outs record, within a geographical area, toll free calls to long distance information operators when any abnormality appears (CT 26, 35). Company print-outs from April through November, 1966, reflected 2,020 such calls from telephone number 371-1261 (CT 35). Some of these calls were of unusually long duration (CT 30). Between August and late November 1966, print-outs indicated 40 long distance information calls made from number 377-4275 (CT 36-37). Both telephones were listed to Frank Garber, at 2395 New Jersey Avenue, San Jose (CT 28-29, 36).

In May 1966, computer print-outs showed 108 long distance information calls from number 266-2737, listed to subscriber Vince Colombo at 1898 Meridian Road, San Jose (RT 169). Subsequently, Colombo transferred his telephone service to number 252-4608, at 19400 Sorenson Drive, Apartment 209, Cupertino (RT 170). In September, October, and November 1966, 75 long distance information calls were placed from Colombo's new number (RT 170-71). The manager of both the Meridian Road and Sorenson Drive apartments identified Frank Garber as Vince Colombo. The apartments were rented by George Rivera, also known as Charles Teran (CT 4-8, 63).

Computer print-outs for October and November 1966, showed 345 long distance information calls from number 243-3526 and 14 such calls from number 243-4229, some of long duration (CT 38-39). Both telephones were located in the home of Benny Noto, at 315 Carriage Drive, Santa Clara (CT 37).

The recited print-out data indicated either equipment malfunctions or the use on petitioners' telephone line of illegal "blue box" devices. Telephone company personnel first ascertained that their lines were in working order (CT 40; RT 203-04). The company then concluded that "blue boxes" were in use on petitioners' lines (RT 203).

A "blue box," or a multi-frequency signal generator, is an acoustical device used to deceive the automatic billing equipment employed by telephone companies since the adoption of the direct dialing system. Using a "blue box" one may call free of charge virtu-

ally any number in the United States and Canada (CT 19).

The device, which may be held in one hand, resembles a modern miniature telephone operator's switchboard; it is linked to the subscriber's telephone (CT 17). The user dials an area code, then the universal long distance information number on his telephone. This is recorded by company equipment as a toll-free call. By activating the release button on his "blue box" the user then indicates to the telephone toll circuit that he has terminated his call; in fact, he has retained control of the trunk line. After pushing the start button, the user next depresses numbered buttons on the "blue box" to dial the number of his choice. This portion of the call, save for duration, is unrecorded and, therefore, free (CT 17-20). Once a person has cut into the trunk line he can make successively an unlimited number of calls to different numbers (RT 86-87; CT 20).

The telephone company is required by federal law to maintain records on all long distance calls so that excise taxes may properly be levied (CT 42). In order to prepare bills, and to acquire positive demonstrative evidence of illicit "blue box" use, it is necessary to monitor the telephone lines of suspected "blue box" users. However, Security Agent Alex testified, company officials realize that "we didn't have the correct equipment to actually go on the line and still protect the customer's privacy in case we were wrong" (CT 40). The company, therefore, developed special equipment which would monitor and record

only outgoing calls illegally placed (CT 40). Monitoring equipment was activated upon the sound of the 2,600 cycle tone generated by the "blue box" (CT 43).

Commencing October 24, 1966, this new monitoring equipment was installed on Garber's line (CT 42; RT 189). Only outgoing calls placed with the "blue box" were monitored (RT 190). Monitoring ceased on November 2, 1966 (RT 192). During the 28 hours of monitoring, some 65 minutes were recorded (RT 191-92, 206-07).

Having completed its investigation, the telephone company on November 29, 1966, first approached law enforcement officials (RT 36, 193-94). In this initial encounter the company disclosed that they had evidence of toll fraud within the jurisdiction of the District Attorney of Santa Clara County. Apparently, appellants were identified as suspects (RT 41). Company representatives did not reveal the existence or contents of recorded calls (RT 61-62, 205-06).

On November 30, 1966, in response to the written demand of the District Attorney (RT 57), the company presented to the prosecutor tape recordings of calls placed with a "blue box" on Garber's line (RT 44). Certain of these tapes were placed in evidence. Concededly, they constitute evidence "truly illustrative of bookmaking activities" (RT 88-89). Petition, p. 6.

On December 11, 1966, warrants were procured for the search of the Noto premises at 315 Carriage Drive, Santa Clara, and for the Garber residence at 2395 New Jersey Avenue, San Jose (RT 164-65, 170-71).

Telephone company print-outs disclosed that a "blue box" call was placed from Teran's Sorenson Drive apartment between 10:00 and 11:00 a.m. each Monday (RT 171). On Monday, December 12, at 8:00 a.m., company monitoring equipment was placed on Teran's line for the first time (RT 173). A call was placed at approximately 10:15 a.m. (RT 174). George Alex, monitoring the call, detected the familiar "blue box" tone (RT 183-84). The call was not recorded because recording equipment had not yet been fully set up (RT 183-84). The "blue box" was used three times; apparently the device malfunctioned for no calls were completed (RT 186-88). By prearrangement, Alex advised the District Attorney that a multi-frequency signal generator was being used at Teran's address (RT 187).

Police placed Teran's apartment under surveillance on the evening of December 11 (RT 27). According to plan, when the "blue box" device was being used Alex would so inform the authorities. Detective Oria Curtis and Investigator Philip Morris would then enter the apartment and arrest the user (RT 10, 12). On the morning of December 12, they received the anticipated information over the police radio that the "blue box" was in use (RT 13, 99-102).

Curtis, accompanied by several officers, proceeded a short distance to Teran's apartment and knocked on the front door. Teran appeared at a window next to the front door and pulled aside the drapes. Speaking loudly, Curtis said, "May I see you? Open the door." (RT 15). Teran replied, "Who are you?" Curtis

responded, "Open the door and I'll introduce myself." Teran repeated his inquiry. Curtis then placed his identification card before the window so that Teran could read, in ½ inch bright blue letters, "Sheriff's Office" (RT 17). Teran scrutinized the card, said "just a minute," and disappeared. Twenty-five seconds later Curtis knocked again. Hearing a commotion within, he forced entry (RT 19). Morris then entered through the rear door (RT 23). Curtis arrested Teran and Garber in the living room (RT 20). A search of the apartment uncovered two "blue boxes" (RT 108-10), and evidence of bookmaking including sports journals, adding machines, business records, and $2,970 in cash lying on a table (RT 105-15).[2] At 10:20 a.m. on December 12, Santa Clara Police Officer Macer executed the warrant authorizing a search of the Noto premises (RT 71-72). Officer Macer rang the doorbell and was admitted by Noto (RT 73-74). Bookmaking paraphernalia and racing journals were discovered (RT 74-81). Officers found a "blue box" secreted in a ceiling light fixture (RT 81-82). At 10:16 a.m. on December 12, San Jose police officers executed the warrant authorizing a search of the Garber premises (CT 89; RT 64). Evidence uncovered during this search was ruled inadmissible by the Court of Appeal on the ground that by failing to give notice of their authority prior to entry, the officers did not comply with state law, Penal Code section 1531. Petition, Appendix 1, xvi.

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[2]There was testimony by Robert Mitchell that he placed wagers with Garber between May and September of 1966 (CT 64). Once, Garber collected a gambling debt from Mitchell accompanied by Teran (CT 65-67).

ARGUMENT

I

THE FEDERAL COMMUNICATIONS ACT, 47 U.S.C. § 605, DOES NOT APPLY IN THIS CASE AND DOES NOT RENDER INADMISSIBLE AGAINST PETITIONERS EVIDENCE OBTAINED BY TELEPHONE COMPANY MONITORING.

Petitioners urge the Court to accept this state case in order to resolve what they characterize as a conflict among federal appellate courts as to the proper interpretation of section 605 of the Communications Act. This Court recently declined to entertain precisely this question in denying certiorari in *Hanna v. United States,* 404 F.2d 405 (5th Cir. 1968), *cert. denied* 394 U.S. 1015 (1969).

The Court cannot reach in our case the question which it refused to pass upon in *Hanna.* "[A]t the time of the alleged violation," the Court of Appeal held, section 605 "had no application to the admission of evidence in state courts." 275 A.C.A. 127, 135; Petition, Appendix 1, viii. As the Court of Appeal explained quite succinctly:

> "In *Schwartz v. Texas* (1952) 344 U.S. 199, 201 . . ., it was held that communications intercepted in violation of 47 U.S.C.A. section 605 were admissible in a state court. (See *People v. Channell* (1951) 107 Cal.App.2d 192, 198-199 [236 P.2d 654].) The *Schwartz* case was overruled in *Lee v. Florida* (1968) 392 U.S. 378 . . ., which held such evidence to be inadmissible in state court trials. The basis of the holding in *Lee* was that *Mapp v. Ohio* (1961) 367 U.S. 643 . . . had overruled *Wolf v. Colorado* (1949) 338 U.S. 25 . . . upon which *Schwartz* had relied for the holding

> that state courts 'were free to decide for themselves whether to condone violations of federal law by accepting the products of such violations as evidence.' . . . However, in *Fuller v. Alaska* (1968) 393 U.S. 80 . . ., the court held that *Lee* was to be applied only to trials in which such evidence is sought to be introduced after June 17, 1968, the date of the *Lee* decision. In the present case the evidence in question was introduced prior to the decision in *Lee*." 275 A.C.A. 135-36; Petition, Appendix 1, viii-ix.

Since the Court's prior decisions hold that section 605 did not govern the admissibility of wiretap evidence in these state court proceedings, this case offers no opportunity for construing the federal statute.

Petitioners characterize interpretations placed upon section 605 by the United States Courts of Appeals for the Fifth and Tenth Circuits as "diametrically conflicting" with the construction of the statute by the Court of Appeals for the Ninth Circuit. Petition, 12. We perceive no irreconcilable conflict.

In *United States v. Sugden*, 226 F.2d 281, 285 (9th Cir. 1955), *aff'd per curiam* 351 U.S. 916 (1956), the Ninth Circuit held that where the use of a communication facility is illegal the right of privacy does not exist and the intercepted matter may be divulged. "The protections of the [Communications] Act were never intended for, nor do they cover, . . . communications which are themselves illegal." *Casey v. United States*, 191 F.2d 1, 4 (9th Cir. 1951), *rev'd on other grounds* 343 U.S. 808 (1952).

In *Bubis v. United States,* 384 F.2d 643 (9th Cir. 1967), the Ninth Circuit reiterated:

> "We do not believe that in the enactment of Section 605 . . . Congress intended to deprive communications systems of their fundamental right to take reasonable measures to protect themselves and their properties against the illegal acts of a trespasser." *Id.* at 648.

Hanna v. United States, said by petitioners to be in conflict with *Bubis,* is in accord on this fundamental proposition and, indeed, relies upon the Ninth Circuit's opinion in *Sugden.* 404 F.2d at 407.

Citing *Brandon v. United States,* 382 F.2d 607 (10th Cir. 1967), the other decision described by petitioners as irreconcilable with *Bubis,* the Ninth Circuit held in *Bubis* that a reasonably apparent illegal user of a telecommunication line must be held to consent to monitoring to the extent reasonably necessary for investigation. 384 F.2d at 648.

Brandon, Hanna, and *Bubis* are in essential harmony: section 605 does not deny a utility the right to employ reasonable measures to protect itself. *Bubis* excluded wiretap evidence admitted in *Hanna* and *Brandon* because in the Ninth Circuit case the utility's measures far exceeded what was reasonably necessary for its self-protection. In *Bubis,* the telephone company monitored all incoming and outgoing calls for three months. Certainly Bubis was not trespassing on telephone company lines when making legal outgoing calls or when receiving incoming calls.

In our case the telephone company, perhaps mindful of *Bubis,* delayed monitoring for a considerable period so that equipment could be developed which would not overhear legitimate calls. This commendable caution enabled the company to monitor *only* outgoing calls illicitly placed. No incoming calls were monitored; no legally placed outgoing calls were monitored. Garber's telephone was monitored during one week only. Teran's telephone was monitored but a few hours. We cannot comprehend petitioners' claim that "the facts in *Bubis* form a counterpart" to the circumstances of their case. Petition, 12. The judgment below appears to be as consistent with *Bubis* as with *Brandon* and *Hanna.*[3]

II

EVIDENCE DISCOVERED DURING THE SEARCH OF PETITIONER TERAN'S APARTMENT IS NOT MADE INADMISSIBLE BY THE FOURTH ADMENDMENT.

Petitioners contend that evidence uncovered by the search of Teran's apartment was obtained in violation of the Fourth Amendment. Apparently, they advance three discrete grounds: police lacked probable cause to believe that a felony was being committed in the Teran apartment when they sought entry; notwithstanding probable cause, the search incidental to the arrest of Teran and Garber was unconstitutional for

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[3]Petitioners invoke the authority of *Katz v. United States,* 389 U.S. 347 (1967). Petition, 14. *Katz* is inapplicable because the electronic surveillance here was conducted more than a year before that decision, *Desist v. United States,* 394 U.S. 244 (1969), and because the search was by a private party, *Burdeau v. McDowell,* 256 U.S. 465 (1921).

want of a search warrant; the scope of the incidental search exceeded the permissible bounds set forth in *Chimel v. California*, 395 U.S. 752 (1969). The Court of Appeal expressly rejected each of these contentions as without merit.

A. Police had probable cause to believe a felony was being committed within Teran's apartment.

A California peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person has committed a felony or has committed an offense in his presence. Cal. Pen. Code §836. Reasonable or probable cause exists when facts known to the officer would lead a man of ordinary care and prudence to believe that the person arrested has committed an offense. *People v. Schader*, 62 Cal.2d 716, 722 (1965); *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

The Court of Appeal correctly designated Alex as a citizen-informant and properly concluded that "the information received from the telephone company security officer concerning the violation of the wiretapping law provided sufficient probable cause to support an arrest." 275 A.C.A. at 137; Petition, Appendix 1, xi. The arresting officer, Curtis, had participated in meetings with telephone company personnel during which the Teran arrest was planned (RT 8-10). Alex also took part in these meetings (RT 193). Curtis learned then that a "blue box" was in use in Teran's apartment (RT 9). In fact, Curtis attended a strategy meeting only three hours prior to the arrest (RT 11). Because the officer was thus acquainted with Alex he could evaluate the reliability of information supplied

by the security agent. Curtis and Morris, who also participated in the arrest, knew that on December 12 information provided by the telephone company would be relayed over the police communications network (RT 13).

Given the participation of the arresting officer in events leading to petitioners' arrest, Curtis' reliance upon information from a source known to him cannot be deemed unreasonable. Whether Alex correctly determined that the Teran "blue box" was used on December 12, has no bearing upon the reasonableness of the officers' reliance on his expert opinion. Aside from being irrelevant, petitioners' suggestion that no "blue box" call was placed on December 12 is refuted by the record. Alex said the device was used three times. The absence of a print-out reflecting these calls may be attributed to the fact that the calls were not completed because the "blue box" malfunctioned (RT 183-88). The illicit uncompleted calls were not recorded as Alex had not fully installed his recording equipment before they were placed (RT 183-84).

B. The search was not unreasonable because police failed to procure a search warrant.

In *United States v. Rabinowitz,* 339 U.S. 56 (1950), this Court held that a warrant, though readily obtainable, was not a condition precedent to a reasonable search. *Id.* at 64.

> "To the extent that *Trupiano v. United States,* 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it . . . that case is overruled." *United States v. Rabinowitz, supra,* 66.

The *Rabinowitz* principle was reaffirmed in *Ker v. California*, 374 U.S. 23, 41 (1963) (opinion of Mr. Justice Clark):

> "The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest . . . ."

After *Ker*, some voiced doubt as to the continued vitality of this aspect of *Rabinowitz*. This Court responded in *Cooper v. California*, 386 U.S. 58, 62 (1967):

> "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States v. Rabinowitz*, 339 U.S. 56, 66."

Chimel v. California, *supra*, overruled *Rabinowitz* only on the question of the constitutionally permissible scope of searches incident to arrest. *Chimel* does not make procuring an available warrant the condition precedent to arrest or to an incidental search.

C. Chimel v. California is inapplicable.

For the reasons articulated by the Court in *Desist v. United States*, *supra*, limiting the rule of *Katz v. United States*, *supra*, to prospective application, California courts have similarly limited the new rule announced in *Chimel v. California*. The search of the Teran apartment and, indeed, petitioners' convictions, antedate the decision in *Chimel*. Unless the Court should decline to apply the limiting rationale of *Desist* to *Chimel* in *Hill v. California*, No. 730, October 1969 Term, *Chimel* is inapplicable here.

CONCLUSION

For the stated reasons we respectfully urge this Court to deny the petition for a writ of certiorari.

Dated, April 20, 1970.

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